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PROMOTION AND PROTECTION OF HUMAN RIGHTS

Impunity

Report of the Secretary-General

I. INTRODUCTION

1. In its resolution 2000/70, the Commission on Human Rights requested the Secretary-General to seek the views of Governments and intergovernmental and non-governmental organizations on the issue of the possible appointment of an independent expert charged with examining all aspects of the issue of impunity of perpetrators of human rights violations, with a view to a decision on this matter at the fifty-eighth session of the Commission; it also requested the Secretary-General again to invite States to provide information on any legislative, administrative or other steps they have taken to combat impunity for human rights violations in their territory and on remedies available to the victims of such violations; and further requested the Secretary-General to collect the information and comments received pursuant to the resolution and to submit a report thereon to the Commission at its fifty-eighth session. The present report, which was prepared in accordance with resolution 2001/70, contains a summary of the replies received from Governments and intergovernmental and non-governmental organizations.

2. In response to the notes verbales and letters sent on 9 July 2001, information was received from the Governments of Argentina, Azerbaijan, Cuba, Guatemala, Norway and Peru and from the non-governmental organizations Association for the Prevention of Torture, International Commission of Jurists and International Union of Lawyers.

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II. REPLIES RECEIVED FROM GOVERNMENTS

Argentina

3. The Government of Argentina stated that it has been working to combat impunity for human rights violations in the country. The 1994 constitutional reform gave constitutional rank to human rights treaties, which may be invoked in the Argentine courts. The Republic of Argentina has ratified the Rome Statute of the International Criminal Court, which it regards as a key document for combating impunity. In the opinion of the Government of Argentina, an independent expert charged with examining all aspects of impunity should be appointed pending the entry into force of the Rome Statute. The Government also provided information on the national institutions and internal legal framework which guarantee the promotion and protection of human rights and combat impunity. It pointed out that the Nation and the provinces have concurrent jurisdiction for the administration of justice. Article 116 of the Constitution provides that the Supreme Court and the lower courts are empowered to hear and decide all cases relating to matters governed by the Constitution and the laws. Within the executive power, there are two areas with responsibility for human rights: the Office of the Under-Secretary for Human Rights within the Ministry of Justice and Human Rights and the Human Rights Department within the Ministry of Foreign Affairs. The objective of the first is the promotion and protection of human rights in the country and it implements or coordinates the following programmes: receipt of complaints of human rights violations and assistance for complainants, inter-institutional relations, the Federal Council of Human Rights (which coordinates policies for the promotion and guarantee of human rights between the federal and provincial governments), historical reparation (which processes benefits for former detainees and civilians tried by military courts until 1983), the National Commission for the Right to an Identity (which encourages the search for disappeared and kidnapped children) and the National Commission on the Forced Disappearances of Persons. The Office of the Procurator for the Prison System, which was established in June 1993 and whose function is to protect the human rights of detainees in the federal prison system, is also part of the executive branch. In July 1995, Congress adopted the act establishing the National Institute to Combat Discrimination, Xenophobia and Racism. Its purpose is to develop national policies and practical measures to combat discrimination, xenophobia and racism. The Government also pointed out that the two legislative chambers have both established commissions on human rights and guarantees, which have multiparty representation. Within the ambit of the legislature, Congress established the Ombudsman's Office in 1993. Its mandate is to protect the rights and interests of individuals and the community in respect of acts and omissions of the administration.

4. The Government of Argentina also provided information on the legal remedies available to citizens when their fundamental rights are violated. These remedies include amparo and habeas corpus. The remedy of amparo was introduced by a constitutional amendment and offers prompt and rapid action against any act or omission by public authorities or private individuals which actually or potentially infringes, restricts, jeopardizes or threatens rights and guarantees recognized in the Constitution, a treaty or a law in a manifestly arbitrary or illegal manner. An application for habeas corpus may be filed when the right infringed is physical liberty, in the event of the illegal worsening of the form or conditions of detention or in the case of the enforced disappearance of persons. The Government stated that an extraordinary appeal to the

Supreme Court of Justice may be made against final judgements in the cases referred to in Act No. 48. The case law of the Supreme Court has extended extraordinary appeal to cases of arbitrary judgements which violate the guarantee of the right to a defence. The Government also referred to the measures of compensation which are granted to victims of human rights violations in Argentina. A 1991 act provides for compensation for the victims of the most recent military dictatorship from 1976 to 1983 and their relatives. The Government stated that its initiative to compensate the victims of torture was based on the recommendations of the Committee against Torture. In December 1994, moreover, Congress adopted an act providing for "the granting of benefits to the rightful successors of individuals who were in a situation of enforced disappearance when the act was promulgated and to the successors of those who died as a result of action by the armed forces, the security forces or any paramilitary group prior to 10 December 1983". This and other measures referred to by the Government are part of the Government's progressive redress policy with regard to the events which immediately preceded the restoration of democracy.

Azerbaijan

5. The Government of Azerbaijan provided information on its domestic legislation relating to impunity and compensation, which includes the Constitution and various national laws. Article 68 of the Constitution states that the rights of a person who has been a victim of a crime or abuse of power are protected by law. "A victim shall have the right to take part in the proceedings and to apply for compensation for the loss or injury suffered. Every person shall be entitled to compensation from the State for loss or injury suffered as a result of unlawful acts or omissions by government bodies or officials." The Compensation Act of the Republic of Azerbaijan (loss or injury suffered by private individuals as a result of acts of preliminary investigation bodies, investigation bodies, the prosecution system and the courts) was adopted in December 1998 and states that compensation must be provided for loss or injury suffered by a person as a result of unlawful arrest, accusation, detention or conviction, unlawful holding and possession of property, individual searches and the unlawful imposition of administrative penalties (art. 1). The Act on Complaints to the Courts states that foreigners and stateless persons may submit complaints and applications to the appropriate courts according to the procedure provided for by law (art. 1). The State Protection Act of December 1998 lists measures to guarantee the safety and social protection of victims and witnesses in criminal cases.

Cuba

6. The Government of Cuba stated that it attaches great importance to the need to put an immediate end to impunity, in all countries and in all its manifestations, for the perpetrators of human rights violations. It considered it necessary to respect the holistic approach to combating impunity adopted at the World Conference on Human Rights, which was held in Vienna in 1993 and which affirmed that all human rights are universal, indivisible and interdependent and that the international community must treat human rights globally in a fair and equal manner. It rejected attempts to impose selective and differentiated treatment on the various categories of human rights and to characterize economic, social and cultural rights as "unenforceable". It strongly supported the immediate appointment of an independent expert to examine all aspects of the issue of impunity, but would object if the independent expert's mandate was to be restrictive

and discriminatory. The independent expert's work should extend beyond compiling and organizing existing legislation to formulating recommendations to the Commission for the progressive development of international standards. In carrying out his mandate, the independent expert must respect a set of basic principles to be embodied in the resolution requesting his appointment, including international cooperation based on Article 2 of the United Nations Charter, the condemnation of unilateral actions, respect for the key role of States in action to combat impunity and the obligation to determine the responsibility of the perpetrators of human rights violations as an essential component of effective compensation and international cooperation through universally applicable mechanisms. The Government stated its views on the most important work still to be done in combating impunity in future.

7. The Government also provided information on various legislative, administrative and other steps taken to combat impunity. It pointed out that the Provincial Court of the City of Havana had brought legal proceedings against the Government of the United States for compensation for injury to persons and damage to property. It also reported that the National Assembly of People's Power of the Republic of Cuba proclaimed the right of the Cuban people to call for the implementation of the Convention on the Prevention and Punishment of the Crime of Genocide in the case of the economic blockade against Cuba. It expressed regret that resolution 2001/70 had not been adopted by consensus and urged all parties to work for such a consensus in future.

Guatemala

8. The Government of Guatemala reported that it was aware of the need to combat impunity and recognized that that would be a lengthy and complex process. With regard to the possible appointment of an independent expert on impunity, it stated that the topic is too broad for one expert to deal with and, with specific reference to the case of Guatemala, where the causes of impunity have already been identified, said that it would be better for the existing thematic rapporteurs to include the topic of impunity in their work. It also provided detailed information on the legislative, administrative and other steps taken in Guatemala to combat impunity. As far as legislative measures are concerned, it referred to various provisions embodied in the Constitution, including the guarantee of free access to the courts and government agencies (art. 29), the institution of proceedings against offenders (art. 45) and the joint responsibility of the Government when a public official violates the law to the detriment of a private individual (art. 155). The independence of the judiciary is guaranteed by article 213 of the Constitution. The Penal Code punishes judges and prosecutors who do not fulfil their obligations "by maliciously failing to prosecute and try offenders", as well as judges who refuse to try a case on the grounds that the law is obscure, insufficient or silent (art. 469). In 1995, Congress amended the Penal Code by incorporating article 201 bis, which characterizes torture as an offence. Other articles characterize enforced disappearance and crimes against humanity as offences. The new Code of Criminal Procedure enacted in 1994 contains a number of positive elements, including article 116, which gives the victim or his representative the right to institute proceedings or become a party to proceedings already instituted by the Public Prosecutor's Department. "This right may be exercised by any citizen or association of citizens against public officials or employees who have directly violated human rights." At present, the Supreme Court is working

on additional amendments to criminal law and criminal procedural law. Decree Law No. 145 of 1996 (National Reconciliation Act) provides for the extinction of criminal responsibility for political or related ordinary offences which occurred during the armed conflict. However, it prohibits amnesty for acts which may not be pardoned or amnestied under national and international law, i.e. enforced disappearances, torture and genocide.

9. The Government also referred to the administrative and political measures adopted, including the demobilization of paramilitary groups and the reorganization of the army. In 1996, Congress amended the Military Code to provide that ordinary crimes or offences committed by members of the military are tried by the ordinary courts. The Government stated that it has adopted two main human rights objectives, namely, public safety and justice. The President of Guatemala indicated that the recommendations of the Commission on Historical Clarification will be implemented. To this end, the Secretariat for Peace has been established to work in cooperation with other national institutions. As a symbol of political will to combat impunity, the Government stated that the case of the murder of Bishop Gerardi has been solved and the persons responsible identified and punished. In June 2001, moreover, the Commission for Peace and Harmony was set up to coordinate action to bring about reconciliation between Guatemalans through the implementation of the recommendations of the Commission on Historical Clarification. The Government also stated that it has solved various cases amicably by recognizing its responsibility for violations of human rights and accepting the obligation to provide compensation for the victims. It said that it would comply with the reports and recommendations of the Inter-American Commission on Human Rights in relation to 44 cases of extrajudicial executions and 5 cases of enforced disappearance. The judiciary has also undertaken to reopen and investigate a number of emblematic cases involving impunity.

10. The Government also provided information on other action and steps taken to combat impunity, including the strengthening of human rights bodies such as the Office of the Human Rights Procurator, the Presidential Commission for Coordinating Executive Policy in the Field of Human Rights (COPREDEH), the Public Prosecutor's Department, the judiciary and the Human Rights Commission of the Congress of the Republic. The National Commission for Monitoring and Supporting the Strengthening of the Justice System was also set up "to support and strengthen institutions and help improve the system of justice in Guatemala". With regard to the work the Commission has carried out, the Government drew attention to the way in which it plans to solve the problem of the abuse of amparo proceedings in the system of justice. As to the Public Prosecutor's Department, the Government reported that priority has been given to the training of prosecutors and that the recommendations of the Special Rapporteur on the independence of judges and lawyers, Mr. Dato' Param Cumaraswamy, have been implemented by the establishment of a career judicial service, an anticorruption prosecutor's office and a complaints office within the Public Prosecutor's Department. The Government also listed a set of measures and achievements relating to prisons and the police. In 1997, Congress established a new National Civil Police, thereby raising the professional level of police officers and taking account of Guatemala's multilingual, multicultural and multi-ethnic nature. Within the police force, there is an Office of Professional Responsibility, which, together with the army high command, has expressed its genuine willingness to place persons from within its ranks who have been accused of human rights violations at the disposal of the competent authorities. The Government also provided information on the Plan for the Modernization of the Judiciary, which is being implemented with the approval of the Supreme Court of Justice.

11. The Government of Guatemala provided a great deal of information on the measures adopted to put an end to the intimidation of judges and other officials and persons involved in the administration of justice. It pointed out that, in 2000, the Supreme Court established the Service for the Protection of Witnesses and Persons Linked to the Administration of Justice and took measures, including coordination with the Public Prosecutor's Department and the National Police, to protect prosecutors and judges who received threats. A special prosecutor's office was appointed to investigate and follow up these cases and a committee on the safety of judges and magistrates has been established. Its objectives are to guarantee the safety of judges and magistrates and their families and to maintain a record of cases in order periodically to analyse the security measures to be taken, depending on the cases' seriousness. It spoke with judges and magistrates who had received threats or had been attacked, established a database and recommended relevant measures to guarantee the safety of judges. The Government also provided information on measures and action taken to reform and improve the administration of justice in the context of action to combat impunity, including judicial training and the establishment of a career judicial service. In 2000, the Supreme Court adopted regulations to give effect to the Career Judicial Service Act and the Judiciary Civil Service Act and subsequently set up a Career Judicial Service Council. A training programme is being implemented at the Judicial Training School to guarantee the competence of members of the judiciary, as well as a full and objective evaluation of their work. The Government also reported that effective and independent monitoring machinery has been set up to combat corruption in the judiciary without undermining the independence of judges and lawyers.

Norway

12. The Government of Norway recalled that, at the time of the adoption of resolution 2001/70 on impunity, it expressed some reservations about the wording used, inter alia, in paragraph 10. It stressed that only States have human rights obligations and that, consequently, no human rights violation as such may constitute a criminal offence. In relation to action to combat impunity, it is the responsibility of States to bring to justice those who have committed an offence, either under national law giving effect to a human rights obligation or under international law. International law establishes individual criminal responsibility for grave breaches of international humanitarian law, war crimes, crimes against humanity and genocide. Against this background, the Government stated that it is not in favour of the appointment of an independent expert on impunity with a mandate as formulated in paragraph 10 of resolution 2001/70.

13. The Government of Norway provided information on some legislative or administrative steps it has taken to combat impunity, pointing out that the legal implementation of Norway's human rights obligations is secured through criminal law and the criminal justice system. Victims of human rights violations may seek compensation from the State in accordance with rules which are partly codified in the Damages Act of June 1969 and others which are unwritten. In addition, the Act on Compensation to Victims of Violence was recently adopted in April 2001. It states that an individual who has suffered bodily harm as a result of intentional assault or another criminal offence involving violence or force, or his surviving relatives, may obtain compensation.

Peru

14. The Government of Peru stated that it was in favour of the possible appointment of an independent expert on impunity. It also provided a great deal of information on the legislative and other measures recently taken by the transitional Government. It stated that, by a supreme decision of June 2001, a national commission for the review and implementation of humanitarian law had been set up as a multisectoral advisory body to the Executive for the purpose of preparing studies and formulating recommendations on respect for international humanitarian law in Peru. It also submitted information on the establishment and work of the Pardons Commission, which was set up to review the cases of innocent persons imprisoned during the anti-terrorism campaign. After five years of work, the Pardons Commission has secured the release of 668 persons, thus implying public recognition of the judicial errors and irregularities committed by bad police officers, soldiers and judges. The Government noted that during Diego García Sayán's term of office as Minister of Justice, 155 pardons were granted last year alone, but about 1,916 applications are still under review, 560 of which are of a priority nature. At present, there is a ruling by the Constitutional Court of 30 October 2000 that requires Government officials who were subpoenaed to comply with the provisions on compensation contained in article 14, paragraph 6, of the International Covenant on Civil and Political Rights once the amount of compensation has been determined by the courts. The Government also reported that Peru signed the Rome Statute of the International Criminal Court on 7 December 2000 and that the process of ratification in Congress has already begun. The Government attaches great importance to the non-jurisdictional decisions and recommendations adopted by international human rights bodies. Under a supreme decree of December 2000, such decisions and recommendations must be handled in good faith and the National Human Rights Council was designated as the body responsible for coordinating their follow-up. A working group of the Council has prepared a report and a bill setting up the machinery for the implementation of such decisions and recommendations.

15. The Government also reported that a supreme decree of June 2001 established the Truth Commission, whose mandate is to help shed light on the crimes and human rights violations committed by terrorist organizations and State agents, to prepare proposals on moral and material reparations for victims and their families and to recommend legal and institutional reforms as preventive guarantees. The Truth Commission will focus on cases of murder and kidnapping, enforced disappearances, torture and serious injuries, violations of the collective rights of the country's Andean and indigenous communities and other crimes. It does not have judicial authority and will therefore not take over the functions of the judiciary or the Public Prosecutor's Department. Once in place, it will have 18 months in which to carry out its work, with the possibility of an extension. Its final report will be submitted to the President of the Republic and the heads of the other branches of government and will be published. The executive will take account of the Commission's recommendations insofar as they are compatible with the law.

16. The Government submitted additional information on the National Anti-Corruption Programme adopted by supreme decision of April 2001. The objectives of the programme are to prepare an analysis of corruption in the country, to propose the basic elements for the preparation of a national agenda for action to combat corruption and to lay the foundations for the

establishment of consultative bodies. The National Anti-Corruption Task Force worked for five months and prepared various reports and recommendations which were submitted to the President of the Republic. The Government stated that the anti-corruption campaign is being headed by the Ministry of Justice. In the context of the serious cases of corruption that have occurred in the past, Congress adopted various legislative measures that have speeded up action to combat corruption.

17. The Government also provided information on compliance with and the enforcement of judgements of the Inter-American Court of Human Rights. In nearly all these cases, compensation has been awarded to the victims or their relatives and/or investigations have been conducted to identify and punish the persons responsible for the violations. In the context of one of these cases, i.e. Castillo Petruzzi et al., Peru withdrew its declaration of acceptance of the jurisdiction of the Inter-American Court, but the Court declared the declaration invalid. Subsequently, the Peruvian Government reversed its decision and reaffirmed its willingness to accept the Court's jurisdiction and cooperate with it. In another case, the Inter-American Court stated that the amnesty laws enacted by the Peruvian Government are incompatible with the American Convention on Human Rights and therefore have no legal effect. In some cases, the compensation granted to the victims has included education and health services to be provided by the Government and the erection of a statue commemorating the victims, as well as guarantees of non-repetition, the publication of the judgement in the Diario Oficial, public excuses, the legal characterization of the crime of extrajudicial execution and the initiation of the process of signing and ratifying the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

18. The Peruvian Government described some of the legal and judicial action being taken against Vladimiro Montesinos, former national security adviser to former President Alberto Fujimori, in connection with various crimes, including corruption and serious human rights violations. In addition to Mr. Montesinos, 748 persons are being investigated and tried, including a number of senior military and police officials. The Government stated that such actions are the most important efforts that have ever been made in Peru's republican history to combat impunity. It also reported that National Human Rights Council has begun work on the preparation and implementation of a national plan for the protection and promotion of human rights.

III. REPLIES RECEIVED FROM NON-GOVERNMENTAL ORGANIZATIONS

19. The Association for the Prevention of Torture (APT) stated that the prevention of torture requires the effective resolution of the problem of impunity. It has therefore been supporting the work being done by the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights on the preparation of an effective set of principles for the protection and promotion of human rights through action to combat impunity. It thus considers that the appointment of an independent expert on the issue of impunity is a crucial step in further developing and implementing the work already undertaken. In its opinion, the independent expert should be entrusted with preparing an updated version of the set of principles for the protection and promotion of human rights through action to combat impunity, with a view

to its adoption by the Commission on Human Rights. The expert should also be entrusted with preparing a set of principles on the issue of impunity for violations of economic, social and cultural rights. APT also suggested that the independent expert should receive views and comments from States and intergovernmental and non-governmental organizations.

20. The International Commission of Jurists (ICJ) stated that it was cooperating in the work of the Sub-Commission on the Promotion and Protection of Human Rights on the issue of impunity and, in particular, with the two experts appointed to study the problem of impunity in relation to civil and political rights, on the one hand, and economic, social and cultural rights, on the other. It referred to its involvement in the process of the preparation of the draft set of principles for the protection and promotion of human rights through action to combat impunity, which includes developments in international law until 1997. It pointed out, however, that developments in the past four years should also be taken into account. It expressed surprise that the Commission on Human Rights should abruptly and inexplicably decide to interrupt its consideration of the draft set of principles and urged that it should resume its consideration of that draft with a view to its adoption. With regard to the possible appointment of an independent expert on the issue of impunity, the Commission stated that, as impunity is a complex topic, impunity for violations of civil and political rights and for violations of economic and social rights give rise to different problems and should be treated separately. The Commission therefore considered that the Commission on Human Rights should appoint two independent experts on impunity with separate mandates: one expert on the impunity of the perpetrators of violations of civil and political rights, with a mandate to update the draft set of principles, and another expert on the impunity of the perpetrators of violations of economic, social and cultural rights, with a mandate to carry out a more in-depth study of the issue and identify and propose international standards. The Commission also noted that impunity should continue to be considered by Commission on Human Rights special rapporteurs and thematic and geographical mechanisms.

21. The International Union of Lawyers welcomed and provided information on some of the significant developments that have taken place in international criminal justice in recent years. It drew attention to the pending establishment of a special court in Sierra Leone and the establishment in Cambodia of ad hoc courts to try the persons responsible for crimes committed during the period of the Democratic Kampuchea regime. These two courts differ from the criminal tribunals for the Former Yugoslavia and Rwanda in that they are set up as mixed systems with room for a national component. Article 5 of the draft statute for the special court in Sierra Leone describes other crimes, in addition to serious violations of humanitarian law, which are regarded as such in the country's internal law. Cooperation is also to be established between the court and the existing Truth and Reconciliation Commission. In the case of Cambodia, the draft memorandum of understanding between Cambodia and the United Nations, which was negotiated in July 2000, provides for the establishment of judicial divisions composed of local judges, with the participation of a prosecutor, an examining judge and foreign judges. In the Union's opinion, this practice reflects the rule that the jurisdiction of national courts should take precedence in the prosecution and punishment of persons responsible for serious violations of international criminal law. The Union also referred to the case of Rwanda, where the Government decided, in order to deal with the case overload represented by the more

than 100,000 prisoners awaiting trial, to use a traditional system of justice, *gacaca*, or "wise men's justice"; in the Union's opinion, this is an initiative that deserves support. With regard to the possible appointment of an independent expert on the issue of impunity, the Union stated that, assuming that such an appointment was appropriate, the expert's mandate should be defined to take account of the many possible types of action against impunity that may be adopted, depending on cultural, legal and judicial particularities. The expert's mandate should not be confined to legal matters, but should also take account of the ethical and moral aspects of the duty to remember the victims and provide redress.

22. The full text of the replies of these States and non-governmental organizations is available for consultation in the Secretariat files.